

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Application No. : 10/678,206
Inventor(s) : Keith Colacioppo et al.
Filed : October 3, 2003
Art Unit : 3732
Examiner : Robyn Kieu Doan
Docket No. : 9049
Confirmation No. : 2120
Customer No. : 27752
Title : Hair Treatment Applicator

APPEAL BRIEF

Mail Stop Appeal Brief - Patents
Commissioner for Patents
P. O. Box 1450
Alexandria, VA 22313-1450

This Brief is filed pursuant to the appeal from the decision communicated in the Office Action mailed on December 10, 2008.

A timely Notice of Appeal was filed on April 7, 2009.

REAL PARTY IN INTEREST

The real party in interest is The Procter & Gamble Company of Cincinnati, Ohio.

RELATED APPEALS AND INTERFERENCES

There are no known related appeals, interferences, or judicial proceedings.

STATUS OF CLAIMS

Claims 18 to 28 are rejected.

Claims 18 to 28 are appealed.

Claims 1-17 and 29 are withdrawn from consideration.

A complete copy of the appealed claims is set forth in the Claims Appendix attached herein.

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STATUS OF AMENDMENTS

Amendment was filed on February 9, 2009, after the Final Office Action of December 10, 2008. The amendment has been entered by the Examiner. The appealed claims were originally submitted in a response to the Final Office Action of November 20, 2007.

SUMMARY OF CLAIMED SUBJECT MATTER

Claim 27 is directed to a combination hair treatment and hair treatment applicator for applying said hair treatment to hair comprising: a hair treatment applicator comprising: a handle; and a head connected to said handle, said head comprising: a first retaining structure comprising a first base, a first plurality of tines extending from said first base, and a first baffle extending from said first base, which together form a first retaining volume configured to hold said hair treatment, receive a first strand of hair, and apply said hair treatment to said first strand of hair; a second retaining structure comprising a second base, a second plurality of tines extending from said second base, and a second baffle extending from said second base, which together form a second retaining volume configured to hold said hair treatment, receive a second strand of hair, and apply said hair treatment to said second strand of hair; a passage extending between said first and second baffle, wherein said passage is substantially free of said hair treatment and is configured to receive a third strand of hair without exposing said third strand of hair to hair treatment contained in said first and second retaining structures; and a hair treatment contained in the first and second retaining structures of the hair treatment applicator. See the specification of the present application at page 2, lines 9-13 and lines 19-24; page 4, lines 28-34; page 5, lines 1-12 and lines 23-28; and figures 5, 6, and 7.

GROUND OF REJECTION TO BE REVIEWED ON APPEAL

The following grounds of rejection are submitted for consideration on appeal by the Board:

- I. Rejection under 35 U.S.C. § 102(b) over WO 00/69308 to Hoffkes et al. (“Hoffkes”).
- II. Rejection under 35 U.S.C. § 103(a) over WO 00/69308 to Hoffkes et al. (“Hoffkes”).

ARGUMENTS

In the Office Action of December 10, 2008, the Examiner finally rejected Claims 17-19 and 27 under 35 U.S.C. § 102(b) as being anticipated by WO 00/69308 to Hoffkes et al. (“Hoffkes”). The Examiner also finally rejected Claims 20-26, 28, and 29 under 35 U.S.C. § 103(a) as being obvious in view of WO 00/69308 to Hoffkes et al. (“Hoffkes”). In the Advisory Action of March 6, 2009, the Examiner maintained the rejection of Claims 18-28 (claims 17 and 29 were cancelled).

For the reasons set forth below, Appellants submit that Claims 18-28 are novel and unobvious over the cited reference. Thus, the Board should reverse the Examiner’s rejections. Accordingly, favorable action by the Board is respectfully requested.

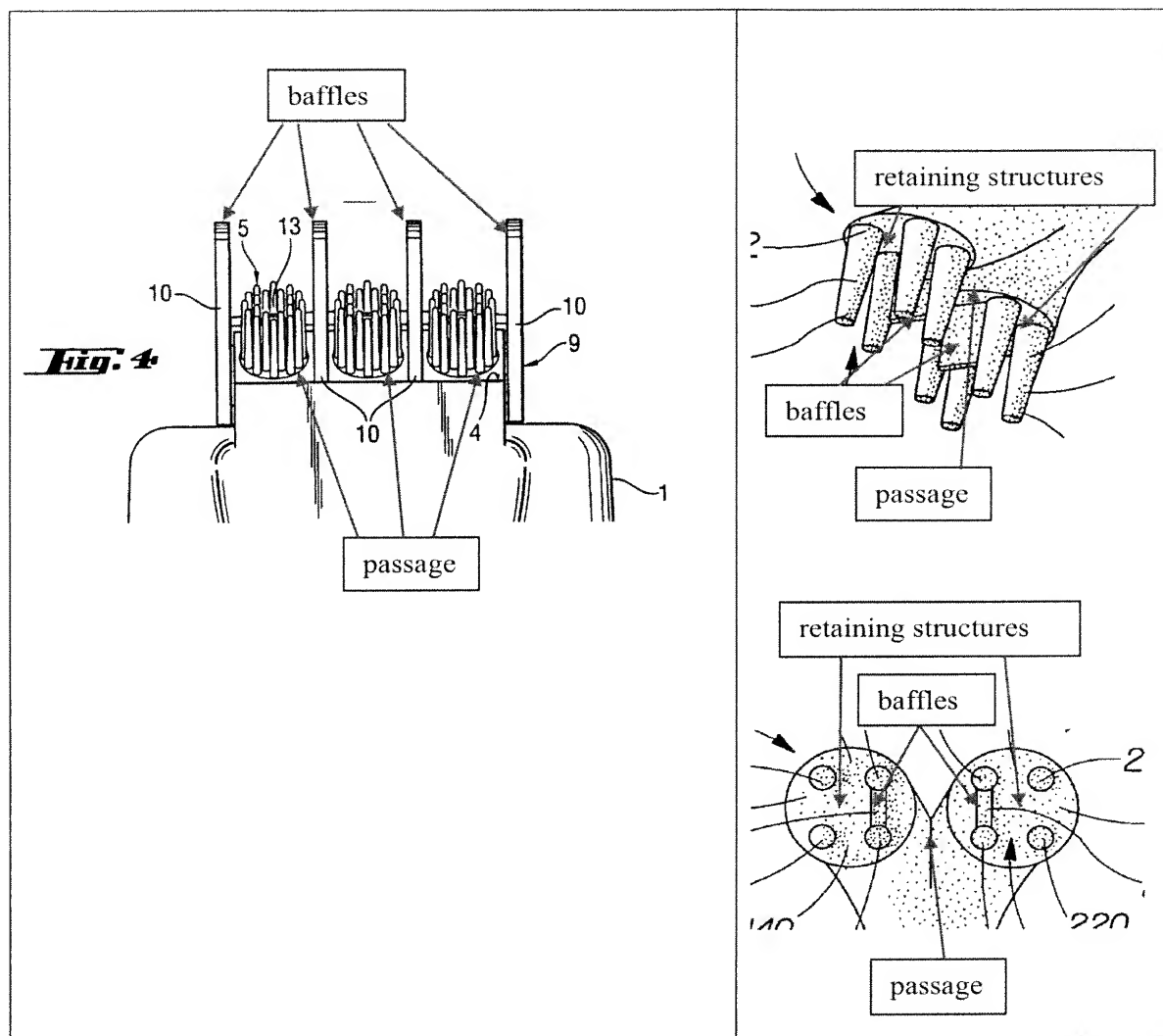
- I. Rejection under 35 U.S.C. § 102(b) over WO 00/69308 to Hoffkes et al. (“Hoffkes”)

Claims 17-19 and 27 are finally rejected under 35 U.S.C. 102(b) as being anticipated by WO 00/69308 to Hoffkes et al. (“Hoffkes”). Claim 17 has been cancelled, thereby rendering the rejection of claim 17 moot. With regard to claim 27, the Examiner asserts that Hoffkes discloses a hair treatment applicator (figs. 3 and 4) comprising a handle (the container to which the cap 1 screw into), a head (1) connected to the handle, the head comprising a first retaining structure (at 5, fig. 4) including a first base (14, fig. 8), a first plurality of tines (5) extending from the base, a first baffle (10, fig. 4) extending from the base which together form a first retaining volume, a second retaining structure (at 5) including a second base (14, fig. 8), a second plurality of tines (5) extending from the second base, a second baffle (10, fig. 4) extending from the second base which together form a second retaining volume; a passage (figs. 3, 4) between first and second baffles, wherein the passage is free of hair treatment prior to first use; a hair treatment

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(translated abstract) contained in the first and second retaining structures. Therefore, the Examiner concludes that Hoffkes anticipates claims 18-19 and 27.

Appellant respectfully submits that the novelty rejection should be withdrawn, because the Examiner has failed to show that Hoffkes teaches each and every element of claims 18-19 and 27. First, the Examiner's interpretation of Hoffkes is both nonsensical and impossible. By definition, prior to first use, hair treatment cannot be contained in the first and second retaining structures of the Hoffkes applicator. Analogously, once hair treatment is dispensed through the outlet openings of the Hoffkes applicator, hair treatment will necessarily be contained in all three chambers of the applicator: the first retaining structure, the second retaining structure, and the passage (4) between the baffles/guide prongs. The outlet openings of the product guides are disposed between the prongs ("each product guide is arranged between two mutually opposite guide prongs", Hoffkes US equivalent, US 6,688,314, col. 2, lines 50-51). Hair colorant is dispensed through the outlet openings. The passage(s) (4) of Hoffkes, therefore, cannot be substantially free of hair treatment, as hair treatment is dispensed into the passage(s) (see below – figure 4 of Hoffkes and figures 2 and 3 of the present application).



Hoffkes teaches that the “prongs narrow the outlet regions of the hair colorant” (Hoffkes US equivalent, US 6,688,314, col. 2, lines 38-41). The passage(s) will thus, by definition, contain the hair colorant. If the passage(s) were free of hair colorant, this would indicate that the applicator device was not functioning properly to dispense hair colorant (e.g., outlets clogged).

Hoffkes thus fails to disclose a passage extending between a first and second baffle, where the passage is substantially free of hair treatment, as required by Claims 18-19 and 27. Accordingly, because each and every limitation of Appellants’ claimed invention is not disclosed, Claims 18-19 and 27 are novel over Hoffkes.

II. Rejection under 35 U.S.C. § 103(a) over WO 00/69308 to Hoffkes et al. (“Hoffkes”)

Claims 20-26, 28, and 29 are finally rejected under 35 U.S.C. 103(a) as being obvious over WO 00/69308 to Hoffkes et al. (“Hoffkes”). Claim 29 has been cancelled without prejudice, thereby rendering this rejection moot. With regard to claims 20-26, the Examiner states that Hoffkes discloses the essential claimed invention *except* for the handle being integrally molded with the retaining structures, the applicator being molded as single piece and being made of polyethylene; Hoffkes also fails to show the shape of the tines being frusto-conical, each tine with a proximal end diameter being .125 to .3125 inches and a distal end diameter of .0625 to .375 inches, a height of each tine being .25 inches to 1 inches and the passage width being at least .25 inches. The Examiner asserts, however, that it would have been obvious to one having an ordinary skill in the art at the time the invention was made to form the handle and the applicator as a single piece, since it has been held that forming in one piece an article which has formerly been formed in two pieces and put together involves only routine skill in the art. The Examiner further asserts that it would have been obvious to one having an ordinary skill in the art at the time the invention was made to employ the applicator being made of polyethylene, since it has been held to be within the general skill of a worker in the art to select a known material on the basis of its suitability for the intended use as a matter of obvious design choice. And, according to the Examiner, it would have been obvious to one having an ordinary skill in the art at the time the invention was made to construct each tine with a proximal end diameter being .125 to .3125 inches and a distal end diameter of .0625 to .375 inches, a height of each tine being .25 inches to 1 inches and the passage width being at least .25 inches, since such a modification would have involved a mere change in the size of the known component.

Finally, with regard to claim 28, the Examiner acknowledges that Hoffkes fails to show the arrangement of the tines in the first and second rows as claimed in claim 28. The Examiner asserts, however, that it would have been obvious to one having ordinary skill in the art at the time the invention was made to construct the tines in the particular

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arrangement claimed in claim 28, since such modifications would involve mere change in the arrangement design of the known component.

Appellant respectfully submits that the obviousness rejection should be withdrawn, because the Examiner has failed to show that Hoffkes teaches each and every element of claims 20-26 and 28. Each of claims 20-26 and 28 requires a passage extending between the first and second baffles, the passage being substantially free of hair treatment and configured to receive a strand of hair without exposing the strand of hair to hair treatment contained in the first and second retaining structures. As detailed above, the guiding prongs of the Hoffkes device do not bound a passage that is configured to receive a strand of hair without exposing the strand of hair to hair treatment. On the contrary, the guiding prongs of the Hoffkes device bound and contain a volume of hair treatment, released through outlets located between the prongs. The passage(s) (4) of the Hoffkes device cannot be substantially free of hair treatment, as hair treatment is dispensed into the passage(s) (see above). If the passage(s) were free of hair colorant during use, this would indicate that the outlets of the applicator device were clogged.

As it fails to teach or suggest each and every element of claims 20-26 and 28, Hoffkes does not establish a prima facie case of obviousness. Consequently, Appellant's claims 20-26 and 28 are patentable over Hoffkes.

SUMMARY

In view of all of the above, it is respectfully submitted that Claims 18-28 are novel and unobvious over the cited reference. Accordingly, the rejections under 35 USC §102(b) and 35 USC §103(a) are improper, and Appellant respectfully requests the reversal of these rejections by the Board.

Respectfully submitted,
THE PROCTER & GAMBLE COMPANY

By /Melissa G. Krasovec/
Signature
Melissa G. Krasovec
Registration No. 59,174
(513) 983-5228

Date: June 5, 2009
Customer No. 27752

CLAIMS APPENDIX

The following is a listing of Claims 18-28, which are the claims involved in the Appeal:

18. A hair treatment applicator according to claim 27, wherein said first plurality of tines extends substantially perpendicularly from said first base.
19. A hair treatment applicator according to claim 18, wherein said second plurality of tines extends substantially perpendicularly from said second base.
20. A hair treatment applicator according to claim 27, wherein said handle is integrally molded with said retaining structures.
21. A hair treatment applicator according to claim 20 wherein said hair treatment applicator is injection molded as a single piece.
22. A hair treatment applicator according to claim 21, wherein said hair treatment applicator is made from a moldable material selected from the group consisting of polyethylene and polypropylene.
23. A hair treatment applicator according to claim 27, wherein at least one of said first and second plurality of tines is frusto-conical in shape.
24. A hair treatment applicator according to claim 23, wherein each of said first and second plurality of tines that is frusto-conical in shape has a proximal end having a diameter from about 0.125 inches (about 0.318 cm) to about 0.3125 inches (about 0.794 cm) and a distal end having a diameter from about 0.0625 inches (about 0.159 cm) to about 0.375 inches (about 0.953 cm).

25. A hair treatment applicator according to claim 27, wherein each of said first and second plurality of tines has a height from about 0.25 inches (about 0.64 cm) to about 1.0 inches (about 2.54 cm).
26. A hair treatment applicator according to claim 27, wherein said passage has a width of at least about 0.25 inches (about 0.64 cm).
27. A combination hair treatment and hair treatment applicator for applying said hair treatment to hair comprising:
 - a hair treatment applicator comprising:
 - a handle; and
 - a head connected to said handle, said head comprising:
 - a first retaining structure comprising a first base, a first plurality of tines extending from said first base, and a first baffle extending from said first base, which together form a first retaining volume configured to hold said hair treatment, receive a first strand of hair, and apply said hair treatment to said first strand of hair;
 - a second retaining structure comprising a second base, a second plurality of tines extending from said second base, and a second baffle extending from said second base, which together form a second retaining volume configured to hold said hair treatment, receive a second strand of hair, and apply said hair treatment to said second strand of hair;

a passage extending between said first and second baffle, wherein said passage is substantially free of said hair treatment and is configured to receive a third strand of hair without exposing said third strand of hair to hair treatment contained in said first and second retaining structures; and a hair treatment contained in the first and second retaining structures of the hair treatment applicator.

28. The combination hair treatment and hair treatment applicator of claim 27, wherein said first plurality of tines is disposed on said first base such that each of said plurality of tines is comprised within a first row of two or more tines aligned in a direction substantially parallel to said longitudinal axis of said handle and a second row of two or more tines aligned in a direction substantially perpendicular to said longitudinal axis of said handle, and wherein said second plurality of tines is disposed on said second base such that each of said plurality of tines is comprised within a first row of two or more tines aligned in a direction substantially parallel to said longitudinal axis of said handle and a second row of two or more tines aligned in a direction substantially perpendicular to said longitudinal axis of said handle.

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EVIDENCE APPENDIX

None

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RELATED PROCEEDINGS APPENDIX

None